IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.2461 OF 2007

Municipal Corporation of
Greater Mumbai ...Appellant
vs.
Harish Lalji Shah ...Respondent

Mr.J.J.Xavier i/b Mr.R.A.Malandkar for the Appellant
Mr.R.A.Thorat for the Respondent.

CORAM: A.S.OKA,J.
DATE : DECEMBER 4,2007.

ORAL JUDGMENT:

1. Admit. The Advocate for the Respondent waives service.

2. Considering the facts and circumstances of the case, taken up for hearing forthwith.

3. The Appellant-Municipal Corporation is the original defendant. The respondent instituted a suit for challenging an order made under section 351 of the Mumbai Municipal Corporation Act,1888. By the impugned Judgment and Decree, the suit has been decreed.

4. The submission of the learned Advocate for the Appellant is that on 16th October 2006, an application was moved by the Appellant seeking permission to file the written statement and the said Application was erroneously rejected by the trial court. He submitted that the written statement was ready at the time of filing the Application and therefore the learned trial Judge ought to have allowed the application made on 16th

October 2006 and taken the written statement on record. He submitted that only on this ground the impugned decree deserves to be quashed and set aside and order of remand deserves to be passed.

5. The learned Advocate for the Respondent pointed out the observations made by the learned trial Judge in paragraph No.10 of the Judgment. He pointed out that after rejecting the application dated 16th October 2006, the learned trial Judge had given an opportunity to the Appellant to challenge the order. However, instead of challenging the said order, the Appellant has chosen to cross examine the witness of the Respondent-Plaintiff. He, therefore, submitted that now it is not open for the Appellant to contend that the said order is illegal. He submitted that the suit has been decided on merits and no interference is called for especially when the Appellants did not file the written statement though various opportunities were given to them.

6. I have given careful consideration to the submissions of the Advocates appearing for the parties. In paragraph 10 of the Judgment the learned Judge has observed that the Application dated 16th October 2006 was disallowed as the written statement could not be filed after expiry of a period of 90 days from the date of service of summons. The suit filed by the Respondent was for protecting the alleged unauthorised construction. It is well settled position of law

that the period of 90 days prescribed by the amended provision of the Code of Civil Procedure,1908 is not mandatory but is directory. Considering the fact that the written statement was ready and was sought to be tendered along with the Application and considering the nature of the controversy involved in the suit, this was a fit case for permitting the production of the written statement. The fact that the applicant has not chosen to file an application for challenging the order dated 16th October 2006 is hardly relevant in view of section 105 of the said Code which permits a party to challenge an interlocutory order while challenging the final decree passed in the suit. Therefore, the submission of the Advocate for the Applicant cannot be discarded only on the ground that the Applicant has not chosen to challenge the order during the pendency of the suit.

7. In view of the facts and circumstances of the case this is a fit case where an opportunity ought to have granted to the Appellant to file the written statement. Hence, the order of remand must follow. However, the Appellant will have to pay costs to the respondent.

8. Hence, I pass the following order :

i) Impugned Judgment and Decree is quashed and set aside and L.C.Suit no.5677 of 2005 is restored to the file.

ii) Parties are directed to appear before the Principal Jude, City Civil Court, Mumbai on 21st January 2008 at 11.00 a.m. The learned Principal Judge will assign the suit to appropriate Court. On that day or within a period of one week therefrom, the Appellant will file the written statement. No further time will be granted to the Appellant.

iii) After the written statement is filed by the Appellant, the learned trial Judge will frame issues and will give an opportunity to the Respondent to lead further evidence.

iv) Till the disposal of the suit, interim order granted in the suit will continue to operate.

v) All contentions of the parties on merits are expressly kept open.

vi) Appeal is partly allowed in above terms.

vii) The Appellant will pay costs of Rs.5000/- to the Respondent within a period of six weeks from today. The payment of costs will be a condition precedent. The deposit of the amount of costs with the trial court within stipulated time will be treated as sufficient compliance with this order.

viii) Parties and the concerned Court to act upon an authenticated copy of this order.

JUDGE